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No. 04-368

In the Supreme Court of the United States

ARTHUR ANDERSEN LLP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury instructions correctly defined the term "corruptly persuades" in 18 U.S.C. 1512(b)(2)(A) and (B) to mean to persuade with an improper purpose to subvert, undermine, or impede the fact-finding ability of an official proceeding.

2. Whether petitioner's conviction for corruptly persuading another to destroy evidence in violation of Section 1512(b)(2)(A) and (B) required proof that petitioner knew its conduct was wrongful.

3. Whether the district court plainly erred in failing to instruct the jury that a conviction under Section 1512(b)(2)(A) and (B) required proof that petitioner intended to obstruct a future government investigation it viewed as likely.

4. Whether the court of appeals erred in concluding that, even if Section 1512(b)(2)(A) and (B) required proof that petitioner intended to obstruct a particular official proceeding, the failure to give such an instruction here was harmless.

5. Whether petitioner preserved its argument that an informal SEC investigation is not an "official proceeding" under 18 U.S.C. 1515(a)(1)(C).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 374 F.3d 281.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2004. The petition for a writ of certiorari was filed on September 14, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of corruptly persuading its employees to destroy documents with an intent to impair their availability in a United States

Securities and Exchange Commission (SEC) investigation, in violation of 18 U.S.C. 1512(b)(2)(A) and (B) (2000). Petitioner was sentenced to five years of probation, fined $500,000, and ordered to pay a special assessment of $400. The court of appeals affirmed. Pet. App. 1a-34a.

1. The trial evidence detailed the involvement of petitioner, an international auditing and consulting firm, and its client, the Enron Corporation, in an accounting debacle that left Enron in bankruptcy in a matter of weeks. The evidence showed that, to prevent Enron's and its own financial misdeeds and aggressive accounting from being uncovered by the SEC, petitioner instructed its employees to undertake an unprecedented campaign of document destruction.

At the time of Enron's collapse, petitioner was already in a precarious position with the SEC. In June 2001, the company settled an SEC action relating to its audit work for Waste Management Corporation, paying a record $7 million fine. The SEC "censure[d]" petitioner and entered a "cease and desist" order enjoining any future securities law violations, effectively placing petitioner under a form of "probation." Pet. App. 4a, 11a-12a; Tr. 1764-1765. In addition, in 1998, the SEC had issued an informal request, followed by a formal subpoena, for records relating to petitioner's audit work for Sunbeam Corporation. Tr. 448-455. In July 2001, the SEC filed an amended complaint against five Sunbeam officers and the lead Andersen partner who worked on the Sunbeam audit, contending that Sunbeam's financial statements were materially false or misleading. Pet. App. 4a, 11a; Tr. 458. Because of these two pre-existing matters, petitioner was very familiar with SEC enforcement proceedings and anxious to avoid any further sanction or censure. Gov't C.A. Br. 27.

Andersen audited the publicly-filed financial statements of Enron, a sophisticated trading and investment conglomerate with a global energy trading business. Pet. App. 3a. Enron

employed accounting practices that were highly aggressive, stretching Generally Accepted Accounting Principles (GAAP) to their outermost limits. *Ibid.*; Gov't C.A. Br. 6. Although petitioner knew of Enron's accounting practices and classified it as a "high risk" client, the two companies had an unusually close relationship. Pet. App. 3a; Tr. 1733-1734. David Duncan, who led Andersen's "Enron engagement team," was known as a strong "client advocate," and Andersen bent over backward to accommodate Enron, its largest domestic client. Gov't C.A. Br. 5. For example, when Enron disagreed with the advice it received from a top Andersen accountant, petitioner removed him, explaining that he was "not sufficiently on board with Enron's accounting attitude." Pet. App. 3a; Tr. 1173. Petitioner's Enron engagement team had more than 100 accountants and the firm billed Enron approximately $58 million in the year 2000. Pet. App. 3a.

In the late summer to early fall of 2001, petitioner's management uncovered serious accounting problems at Enron that caused it to anticipate imminent SEC action and civil litigation. First, in September 2001, high level Andersen personnel discovered that its Enron engagement team had approved the use of an improper accounting technique for four Raptors, a group of special purpose entities (SPEs) that Enron used to engage in "off balance sheet" activities. Pet. App. 3a-4a; Gov't C.A. Br. 6. To conceal the fact that some of the Raptors had experienced sharp losses, petitioner allowed Enron to aggregate the four entities even though petitioner's own accounting experts (the Professional Standards Group) deemed that technique a "black and white" violation of GAAP. Pet. App. 4a; Gov't C.A. Br. 7; Tr. 2290-2291. Second, while examining the Raptor issue, petitioner also determined that Enron and petitioner had made a separate $1.2 billion accounting error in Enron's favor, which would require, at a minimum, that Enron reduce its outstanding

shareholder equity by $1.2 billion in its quarterly SEC filing, due to be announced in mid-October 2001. Pet. App. 6a; Gov't C.A. Br. 7-8.

While Andersen's senior management pondered these accounting issues with rising concern, the public's awareness of Enron's problems was also growing. On August 14, 2001, Jeffrey Skilling, Enron's Chief Executive Officer, resigned unexpectedly, causing widespread speculation about financial problems at Enron and further depressing the already diminished value of Enron's stock. Pet. App. 4a; Gov't C.A. Br. 8. On August 28, 2001, after a Wall Street Journal article suggested improprieties at Enron, the SEC opened an informal investigation of the company. Tr. 656.

In late September, petitioner began to prepare for legal action (including SEC document requests) relating to Enron. By September 28, 2001, in-house attorney Nancy Temple was participating in near-daily meetings or conference calls with an Enron crisis-response group composed of high-level Andersen partners. Pet. App. 4a; Gov't C.A. Br. 9. On October 8, petitioner contacted a litigation partner at the law firm of Davis, Polk & Wardwell to secure representation in Enron-related litigation. Pet. App. 5a; Gov't C.A. Br. 10. The next day, Temple discussed the Enron situation with senior Andersen in-house attorneys. Her meeting notes document Temple's understanding that "some SEC investigation" was "highly probable"; that even if petitioner's accounting experts adopted an alternative methodology concerning the Raptors, there was a "reasonable possibility [that this] will force a restatement"; and that, absent an agreement by those experts, there would be a "restatement and probability of charge of violating cease and desist [order] in Waste Management." Gov't C.A. Br. 10; see Pet. App. 5a.

Concerned about the record that the SEC and private litigants would uncover, Temple and others decided to use the firm's widely ignored document policy to purge harmful ma-

terial from its files. In broad outline, petitioner's document policy required that only information necessary to support the firm's final audit opinion be maintained in the audit-"workpapers." All other information (including draft documents and handwritten notes) was to be permanently destroyed upon conclusion of an audit. Gov't C.A. Br. 11.

On October 10, as a result of conference call discussions with the Enron crisis team, Michael Odom, a Houston partner, urged Andersen personnel (including many members of the Enron engagement team) to comply with the document policy. Odom explained that "if it's destroyed in the course of the normal policy and litigation is filed the next day, that's great . . . we've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable." Pet. App. 5a; Gov't C.A. Br. 13.

Two days later, aware that the Enron engagement team had not been following the Andersen document policy, Temple urged that it be implemented immediately. Minutes after designating the Enron matter as a "government regulatory investigation" in the firm's computer system, Temple e-mailed Odom suggesting that he "remind[ ] the engagement team of our documentation and retention policy" and noting that compliance with the policy "will be helpful." Gov't C.A. Br. 14. Temple urged that the Enron engagement team comply with the policy even though it actually provided that "in cases of threatened litigation, no related information will be destroyed" and identified "regulatory agency investigations (*e.g.*, by the SEC)" as situations where "material in our files cannot be altered or deleted." GX 160A. Odom forwarded Temple's e-mail to Duncan. Pet. App. 5a.

On October 16, 2001, Enron issued a press release announcing a $1.01 billion charge to earnings. During a conference call with analysts later the same day, Ken Lay, Enron's Chief Executive Officer, mentioned that Enron was reducing

"shareholder equity" by approximately $1.2 billion.[1] Pet. App. 5a; Gov't C.A. Br. 16. Those announcements engendered intense negative publicity. *Ibid.* The SEC notified Enron by letter of its existing investigation and requested various accounting information and documents. Pet. App. 6a. Petitioner received a copy of the SEC letter from Enron on October 19. *Ibid.*; Gov't C.A. Br. 17.

Faced with those ominous developments, Temple again ordered compliance with the firm's document policy. On October 19, Temple e-mailed a link to the policy to Professional Standards Group accountant John Stewart, thereby causing Professional Standards Group accountants to delete hundreds of Enron-related e-mails. Likewise, during an urgent conference call on October 20 to discuss the SEC inquiry, Temple twice instructed members of petitioner's Enron crisis management team to "[m]ake sure to follow the [document] policy." Pet. App. 6a; Gov't C.A. Br. 17-18.

On October 23, Enron held another conference call with securities analysts, during which Lay declined to answer certain questions because of "potential lawsuits, as well as the SEC inquiry." Tr. 1876, 1878-1879. By that time, Duncan had concluded that the $1.2 billion accounting error would require a restatement. Tr. 1846-1850. After Lay's October 16 conference call with the analysts, Duncan and the other Enron engagement partners decided that compliance with the previously ignored document policy was imperative. At an "urgent" and "mandatory" meeting, Duncan directed the entire Enron engagement team to comply with the

[1] Lay's press release characterized the charge to earnings as "non-recurring," even though petitioner had informed Enron that that term was misleading. When Enron refused to delete the word, Temple requested that a draft Andersen internal memo regarding the matter be revised to delete any reference to Andersen's conclusion that the press release was "misleading." Pet. App. 5a-6a; Gov't C.A. Br. 14-15.

policy. Pet. App. 6a; Gov't C.A. Br. 18. Duncan knew when he issued the order that the SEC had already requested documents from Enron, and he acted out of concern that "extraneous material" in petitioner's files could be used against it in civil lawsuits and the SEC investigation. Tr. 1887-1888; Gov't C.A. Br. 18-19.

Petitioner's Enron auditors were instructed to make compliance with the document policy a priority despite the mounting time pressure they faced in dealing with Enron's accounting problems. As a result, the Enron engagement team made an unprecedented effort to destroy non-workpaper documents. Documents were shredded on-site and also were shipped to petitioner's main office for bulk shredding. A chart showing the quantity of materials shipped for shredding during 2001 reveals the extraordinary spike in physical document destruction that coincided with petitioner's discovery of the SEC inquiry. Pet. App. 6a. In addition to the destruction of hard copies of documents, tens of thousands of e-mails and other electronic documents were deleted, representing at least a three-fold increase over usual activity. Gov't C.A. Br. 19-20.

Although petitioner and its legal department recognized over the next two weeks that an SEC subpoena was inevitable, the company continued to shred Enron documents. The shredding continued notwithstanding an October 30 letter to Enron signed by two top SEC Enforcement Division officials, a fact that signified the SEC's "unusual" level of concern; petitioner's discovery of two additional major accounting problems—one involving suspected fraud by Enron relating to an entity named "Chewco" and the other a large accounting error by petitioner itself; the decision by Enron's Board of Directors to form a special committee to investigate Enron's accounting; the efforts of Andersen partners to help Enron's Board formulate strategy for dealing with the SEC and restating its finances; the filing of numerous shareholder

lawsuits; and petitioner's receipt of a subpoena for Enron documents from a private plaintiff. Gov't C.A. Br. 21-23; Tr. 1372, 5974-5975. Although Duncan and Temple were both warned during this period about the dangers of destroying documents, neither took any action to stop the shredding campaign they had unleashed. Gov't C.A. Br. 23-24.[2]

Petitioner did not stop shredding until November 9, the day after the SEC served petitioner's general counsel in Chicago with a subpoena for its Enron documents, and Enron announced its intent to file a restatement. Only then did Duncan's assistant send the engagement team an e-mail entitled "Stop the Shredding," which explained that "[w]e have been officially served for our documents." Pet. App. 6a-7a; Gov't C.A. Br. 24.

Enron filed for bankruptcy on December 2, 2001. In April 2002, Duncan pleaded guilty to obstructing the SEC investigation. Gov't C.A. Br. 24.

2. On March 7, 2002, petitioner was indicted in the United States District Court for the Southern District of Texas on one count of corruptly persuading its personnel to withhold, alter, destroy, or conceal documents with the intent to impair their availability in an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B).[3]

[2] On October 26, 2001, Andersen partner John Riley heard the sound of shredders operating in the Houston office and warned Duncan that "this wouldn't be the best time in the world for you guys to be shredding a bunch of stuff." Tr. 5901. Duncan agreed that the "worst-case scenario" in a "situation like this" would be "people * * * destroying a lot of documents," but then took no action. Tr. 5900-5901. Six days later, David Stulb, another Andersen partner, saw Duncan attempting to discard a document Duncan described to him as "another smoking gun." Tr. 3667. Stulb warned Duncan of the need to retain "all of this information" because of the "strong likelihood" that, *inter alia*, the SEC and other bodies would be interested. Tr. 3667. Stulb also informed Nancy Temple that Duncan needed guidance on document retention. Temple promised to take care of the matter and then did nothing. Tr. 3668-3674.

At the close of trial, the court instructed the jury about the statutory term "corruptly persuades" in Section 1512(b), stating: "The word 'corruptly' means having an improper purpose. An improper purpose for this case is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." Pet. App. 48a-49a. The court also informed the jury that

> it is not necessary for the Government to prove that [petitioner] knew its conduct violated the criminal law. Thus, even if [petitioner] honestly and sincerely believed that its conduct was lawful, you may find [petitioner] guilty if you conclude that [petitioner] acted corruptly and with the intent to make documents unavailable for an official proceeding.

[3] 18 U.S.C. 1512(b)(2)(A) and (B) (2000) provide that

> [w]hoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to
>
> * * * * *
>
> (2) cause or induce any person to —
>
> (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; [or]
>
> (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding * * *
>
> shall be fined under this title or imprisoned not more than ten years, or both.

Section 1512 has been amended twice since petitioner's offense and conviction, but the language of Section 1512(b) is unaltered. All references in this brief to Section 1512 are to former Section 1512, unless otherwise specified.

Id. at 49a. The court's instructions defined the term "official proceeding" as "a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served." *Ibid.*[4] The jury returned a guilty verdict.

3. The court of appeals affirmed. Pet. App. 1a-34a. The court concluded, *inter alia*, that the jury instructions correctly defined the statutory term "corruptly" to mean acting with an "improper purpose" "to subvert, undermine, or impede the fact-finding ability of an official proceeding." *Id.* at 17a-25a. The court noted that the jury instructions accorded with the way in which the term "corruptly" had been routinely defined in related obstruction of justice statutes and with how a majority of circuits interpreted the term in Section 1512(b). *Id.* at 18a. The court rejected the contention that the instruction rendered the term "corruptly" superfluous. While Section 1512(b)(2)(B) separately requires that the defendant act with an "intent to impair the * * * integrity or availability [of an object] for use in an official proceeding," the court explained that an intent to "subvert," "undermine," or "impede" an investigation, "implies a degree of personal culpability beyond a mere intent to make documents unavailable." *Id.* at 22a. Likewise, the court noted that the statute's legislative history supported the district court's interpretation. As originally drafted, Section 1512(b) applied only to coercive conduct (*i.e.*, intimidation, physical force or threats, or misleading conduct). In adding the term "corruptly," which had long been defined as used in Section 1503 to mean "motivated by an improper purpose," Congress indicated that it wanted to "include in section 1512 the same

[4] Contrary to petitioner's claim (Pet. 4), the court did not instruct the jury that "the Government did not have to prove that the 'corrupt persuader' had any particular proceeding in mind or knew that a future subpoena was likely."

protection of witnesses from non-coercive influence that was (and is) found in section 1503." *Id.* at 23a. Accordingly, the Fifth Circuit concluded, since "§ 1503 proscribed conduct undertaken 'with an improper purpose,' § 1512(b) should also do so." *Ibid.*

The court of appeals also concluded that an alternative instruction proposed by petitioner was not substantially correct. The court noted that petitioner's proposed instruction, which stated that a defendant acts "corruptly" only when he uses an improper means of persuasion or causes another to violate an independent legal duty, had no support in the statute or existing law. Pet. App. 23a. And, the court concluded, any error in failing to give petitioner's instruction was harmless, because the instruction actually given, like petitioner's proposed instruction, already required the jury to find a level of culpability—an "intent to subvert, undermine, or impede"—over and above a mere intent to follow a document retention policy that would result in making a document unavailable in an official proceeding. *Id.* at 24a-25a. Likewise, the court rejected petitioner's claim that Section 1512(b)(2) requires proof that the defendant knew his conduct was unlawful, noting the "general rule * * * that ignorance of the law is no defense." *Id.* at 29a.

The court of appeals also concluded that the district court correctly refused petitioner's request to instruct the jury that the official proceeding that petitioner intended to obstruct must have been "ongoing * * * or scheduled to be commenced in the future." Petitioner grounded that request in language from *United States* v. *Shively*, 927 F.2d 804, 813 (5th Cir.), cert. denied, 501 U.S. 1209 (1991), but the court found that language to be *dicta* that "defies the statutory provision that an official proceeding 'need not be pending or about to be instituted at the time of the offense.'" Pet. App. 26a (quoting 18 U.S.C. 1512(e)(1)).

Similarly, the court of appeals found no reversible error in the district court's failure to instruct the jury that petitioner could be found guilty only if it sought to obstruct a "particular proceeding." Pet. App. 26a-27a. Once again the court found that petitioner's proposed instruction "ignores the statutory language, which does not require a defendant to know that the proceeding is pending or about to be initiated." *Id.* at 27a. The court also rejected petitioner's claim that such an instruction was needed to prevent petitioner's conviction for innocent maintenance of a records program. The court found that no such risk existed here because "[t]his case was tried on the theory that [petitioner] intended to undermine, subvert, or impede a proceeding of the SEC," not under the theory that a mere "records retention program violated the Act." *Ibid.* Accordingly, the court concluded, "[t]here was no risk of conviction for innocent maintenance of a records program." *Id.* at 28a.

ARGUMENT

Although petitioner identifies only one question presented, *i.e.*, whether the jury instructions misinterpreted the elements of the offense created by 18 U.S.C. 1512(b)(2)(A) and (B) (Pet. I), the petition discusses five separate issues of statutory interpretation under that provision. Two of those issues were not raised or preserved below, and none of the issues merits certiorari review.

1. a. Petitioner asks this Court to address the meaning of "corruptly persuades" under Section 1512(b), warning that the Fifth Circuit's "enormously influential" decision "pos[es] serious risks of prosecution for virtually every company that maintains a document retention policy." Pet. 13.[5] In fact,

[5] Contrary to petitioner's claims (Pet. 11-12), this case does not involve the validity of "a hundred years" of precedent on "obstruction of justice." It concerns the meaning of a particular criminal statute, 18 U.S.C. 1512(b), which was enacted in 1982 and amended in 1988 to add the "corruptly persuades" element that petitioner challenges.

the decision below will have little future impact in prosecutions for document destruction, because Congress recently adopted a new criminal provision addressing such conduct. 18 U.S.C. 1519, enacted as part of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, Tit. VII, § 802(a), 116 Stat. 800, prohibits, *inter alia*, the knowing destruction of documents "in relation to or contemplation of" "any matter within the jurisdiction of any department or agency of the United States." Section 1519 also contains a greater maximum term of imprisonment (20 years) than Section 1512(b)(2) (ten years). Most federal prosecutors will henceforth use Section 1519—which does not require proof that the defendant engaged in "corrupt persua[sion]"—to prosecute document destruction cases, including cases in which the defendant persuaded or otherwise caused or aided and abetted subordinates to destroy documents, as here. The question presented in this case—whether document destruction cases like this one may also be prosecuted under Section 1512(b)(2)—is thus of little continuing practical importance.[6]

b. Even absent the new statute, the meaning of "corruptly persuades" in Section 1512(b) would not warrant further review. Despite petitioner's frequent resort to due process rhetoric (Pet. 12, 15, 18, 23, 26, 28), petitioner has never claimed that Section 1512(b) denied it due process by failing to provide fair warning that its conduct was unlawful. The

[6] With respect to the specific issue of accountants' papers, the Sarbanes-Oxley Act also added 18 U.S.C. 1520, which requires the maintenance of "all audit or review workpapers" for five years, 18 U.S.C. 1520(a)(1), and the promulgation by the SEC of further requirements for the "retention of relevant records," 18 U.S.C. 1520(a)(2). Violation of the statutory or SEC requirements is a criminal offense, 18 U.S.C. 1520(b), and future cases involving destruction of accountants' papers could also be brought under that provision.

reason for that omission is clear. At the time of petitioner's document destruction campaign, federal law gave ample notice that persuading others to destroy evidence to thwart an impending federal investigation was a crime, *United States* v. *Shotts*, 145 F.3d 1289, 1300-1301 (11th Cir. 1998), cert. denied, 525 U.S. 117 (1999); *United States* v. *Thompson*, 76 F.3d 442, 452 (2d Cir. 1996), and that companies were not free to destroy documents so long as a subpoena had not yet arrived, *United States* v. *Gravely*, 840 F.2d 1156, 1160-1161 (4th Cir. 1988).

Accordingly, petitioner has preserved only a statutory claim that the phrase "corruptly persuades," as used in Section 1512(b)(2), requires proof that it used improper means of persuasion or that it persuaded its employees to commit unlawful acts. The lower courts correctly rejected that claim. Congress borrowed the word "corruptly" in Section 1512(b)(2) from a related obstruction of justice statute, 18 U.S.C. 1503, where it has long been understood to mean conduct motivated by an improper purpose. *Thompson*, 76 F.3d at 452 (citing cases); *United States* v. *Haas*, 583 F.2d 216, 220 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979).[7] The majority of courts of appeals that have considered the meaning of "corruptly" in Section 1512(b) have therefore accorded it the same meaning. *Shotts*, 145 F.3d at 1300-1301 (holding that "corruptly" means "motivated by an improper purpose"); *United States* v. *Khatami*, 280 F.3d 907, 911 (9th Cir. 2002) ("[O]ne who attempts to 'corruptly persuade' another is, given the pejorative plain meaning of the root adjective 'corrupt,' motivated by an inappropriate or improper purpose to convince another to engage in a course of behavior."), cert. denied, 535 U.S. 1068 (2002); see also *United States* v. *Brady*, 168 F.3d 574, 578-579 & n.3 (1st Cir. 1999) (suggesting that "corruptly" in Section 1512 is satisfied by proof of an improper motive of obstructing justice).

The prevailing view of the meaning of the term "corruptly" in obstruction statutes finds strong support in the legislative history of Section 1512. Before 1982, Section 1503 prohibited corrupt or coercive efforts to influence witnesses, jurors, and court officials in its first clause; its second so-called "omnibus clause" in relevant part criminalized the conduct of anyone who "corruptly * * * endeavors to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. 1503 (1976).

Because, as noted above, the term "corruptly" was interpreted to mean for an "improper motive or with bad or evil or wicked purpose," *United States* v. *Partin*, 552 F.2d 621, 642 (5th Cir.), cert. denied, 434 U.S. 903 (1977); see *Thompson*, 76 F.3d at 452, Section 1503 encompassed non-coercive, non-deceptive acts of witness tampering, such as urging a witness to testify falsely or to refrain from testifying or to destroy evidence. See, *e.g.*, *United States* v. *Jackson*, 607 F.2d 1219, 1223 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980); *United States* v. *Howard*, 569 F.2d 1331, 1334, 1337 & n.9 (5th Cir.), cert. denied, 439 U.S. 834 (1978). Section 1512 was enacted as part of the Victim Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 4(a), 96 Stat. 1248, which was intended to broaden protections for witnesses. The VWPA deleted the protection for witnesses from the first clause of Section 1503, left the omnibus clause of Section 1503 intact, and enacted Section 1512, but without the "cor-

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[7] The use of "corruptly" in the new Section 1512(c), which was added in 2002, see Pub. L. No. 107-204, § 1102, 116 Stat. 745, likewise mirrors the use of that term in another obstruction of justice statute, 18 U.S.C. 1505 (prohibiting "corruptly * * * influenc[ing], obstruct[ing], or imped[ing]" pending agency proceedings or congressional investigations). There is no dispute that "corruptly" in Section 1505 encompasses acting with an improper purpose. See 18 U.S.C. 1515(b) ("As used in section 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement."); see p. 21, *infra*.

rupt persuasion" element. Thus, as originally enacted, what became Section 1512(b) was limited to coercive or deceptive conduct; it prohibited only the knowing use of intimidation, force, threats, or misleading conduct with the requisite intent to, for example, influence the testimony of a person in an official proceeding, and did not cover non-coercive, non-deceptive witness tampering—conduct that was previously covered by Section 1503. See *United States* v. *Tackett*, 113 F.3d 603, 608-609 (6th Cir. 1997), cert. denied, 522 U.S. 1089 (1998).

The statutory changes led to a circuit split. While a majority of the courts of appeals to address the issue continued to uphold prosecutions of non-coercive witness tampering under the omnibus clause of Section 1503, see *Tackett*, 113 F.3d at 607 (citing cases), the Second Circuit refused to allow conviction under Section 1503 of a defendant who asked a witness to lie to the grand jury, reasoning that Congress meant Section 1512 to be the exclusive vehicle for prosecuting witness tampering. *United States* v. *Hernandez*, 730 F.2d 895 (2d Cir. 1984).

In response, Congress amended Section 1512 to add "corruptly persuades" to the list of prohibited conduct. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(a) and (c), 102 Stat. 4181. The section-by-section analysis of the legislation described "corrupt persuasion" broadly to include conduct that requires neither illegal means of persuasion nor persuasion to violate a legal duty. See 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988) ("'Corrupt persuasion' of a witness is a non-coercive attempt to induce a witness to become unavailable to testify.").[8] Moreover, the section-by-

[8] Convincing a witness to destroy documents is no less culpable than convincing him to become unavailable to testify. Indeed, the latter can be less damaging, since a missing witness can be located while a destroyed document is gone forever.

section analysis explained that the amendment was intended "merely to include in section 1512 *the same protection of witnesses from non-coercive influence that was (and is) found in section 1503*." *Ibid.* (emphasis added).[9] Because the term "corruptly" in Section 1503 had long been defined to mean "motivated by an improper purpose," "[i]t is reasonable to attribute to the 'corruptly persuades' language in Section 1512(b), the same well-established meaning." *Shotts*, 145 F.3d at 1301; see *United States* v. *Farrell*, 126 F.3d 484, 492 (3d Cir. 1997) (Campbell, J., dissenting).

c. Contrary to petitioner's claim (Pet. 22), the court of appeals' construction of Section 1512(b) does not render the word "corruptly" superfluous. The instructions here required the jury to find both that petitioner acted "corruptly," *i.e.*, with "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," Pet. App. 18a, and that it acted with an intent to withhold material from an official proceeding, *id.* at 47a. Those two intents are not the same. An Andersen employee could, for example, delete embarrassing personal e-mails from the company's computer system to prevent their disclosure in an SEC investigation without being motivated by a desire to subvert, undermine, or impede that investigation itself. Thus, as the Fifth Circuit observed, the terms "subvert," "undermine," and "impede" each "implies a degree of personal culpability beyond a mere intent to make documents unavailable." *Id.* at 22a.

Nor does the court of appeals' reading of "corruptly persuades" render the scheme of corruption of justice statutes

[9] Petitioner argues (Pet. 23 n.23) that Senator Biden's comments on the VWPA referred only to cases in which the "corrupt persuasion" involved "independently wrongful efforts to influence witnesses." See also Pet. 16-17. Senator Biden stated, however, that he was offering merely "[e]xamples" of "corrupt persuasion," not that he was purporting to give an exhaustive list of conduct that would fall under the amended Section 1512. 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988).

(as of 2001) "positively nonsensical." Pet. 22. Petitioner notes (Pet. 1-2, 15, 26) that, at the time of the charged conduct, it was illegal to persuade someone else to destroy documents to thwart an anticipated federal proceeding but not illegal to destroy documents one's self. That apparent statutory omission has little relevance here, because petitioner's own document destruction largely took place *after* it knew of the SEC's informal investigation—*i.e.*, at a time when it was unlawful under 18 U.S.C. 1505 for petitioner itself to destroy the documents. See p. 29, *infra*. Nor is the distinction between acting alone and acting in concert with others "nonsensical."[10] Indeed, it is petitioner's own interpretation of Section 1512(b) that would inject a large dose of incongruity into the obstruction statutes by making the word "corruptly" mean one thing in Section 1512(b) and something entirely different in Sections 1503, 1512(c), and 1515. In any event, insofar as there was a statutory gap in 2001, Congress closed the claimed loophole in 2002 by enacting Section 1512(c), which prohibits individuals from "corruptly" destroying documents on their own "with the intent to impair the object's * * * availability for use in an official proceeding," and Section 1519, which prohibits the knowing destruction of documents "in relation to or contemplation of" "any matter within the jurisdiction of any department or agency of the United States." Further review is not warranted to consider the correct interpretation of Section

[10] It is, for example, illegal to conspire with another to commit a future crime but not illegal to formulate an intent to commit a crime on one's own. Moreover, the facts of this case illustrate the dangers of concerted action. On his own, David Duncan destroyed a few boxes of documents, while collectively the Enron engagement team destroyed nearly two tons of paper and tens of thousands of e-mails. Pet. App. 6a; Gov't C.A. Br. 4.

1512(b)(2) in light of a purported statutory gap that no longer exists.[11]

d. Petitioner errs in contending (Pet. 18-21) that the decision below conflicts with decisions from the Third and D.C. Circuits.

In *Farrell*, *supra*, the defendant was convicted under Section 1512(b)(3) of "corrupt persuasion" after he urged a coconspirator not to reveal to federal agents self-incriminating information about their joint criminal activities. 126 F.3d. at 486-487. The Third Circuit's decision reversing the conviction was a limited one. The court held that "the 'culpable conduct' that violates § 1512(b)(3)'s corruptly persuades clause does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self- incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators." *Id.* at 488. Beyond that specific holding that "corruptly persuades" does not include persuading an individual to assert a valid constitutional privilege, the court stated that it was "hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous 'corruptly persuades' clause. * * * [W]e do not think it necessary to provide such a definition here." *Ibid.* Moreover, although the court opined that the term "corrupt" must mean something more than simply an "improper purpose," it specifically left open the question whether persuading a person to withhold information from

[11] Contrary to petitioner's claim (Pet. 12, 23), the court of appeals' interpretation of Section 1512(b)(2) does not violate the rule of lenity. The rule of lenity "applies only if, after seizing everything from which aid can be derived, . . . [the court] can make no more than a guess as to what Congress intended." *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (citations and internal quotation marks omitted). As explained above, the language, structure, and legislative history of Section 1512(b)(2) make Congress's intent clear.

federal investigators absent a valid Fifth Amendment privilege to do so would be covered by Section 1512(b)'s "corruptly persuades" clause. *Id.* at 489 n.3. Thus, as the Fifth Circuit correctly concluded (Pet. App. 21a, 23a), *Farrell* did not address the issue presented here.[12]

Moreover, since *Farrell*, the Third Circuit has not clearly resolved how the term "corruptly" applies under Section 1512(b) to cases that do not involve the assertion of a Fifth Amendment privilege. In *United States* v. *Davis*, 183 F.3d 231 (3d Cir. 1999), the court appeared to rely (without any further analysis) on *Farrell*'s *dicta* that "corrupt" conduct requires more than an "improper purpose." But a few months later, in *United States* v. *Applewhaite*, 195 F.3d 679, 688 (1999), the Third Circuit affirmed a conviction under Section 1512(b)(2) for "corrupt" behavior where the defendants, without using any unlawful means, persuaded an unsuspecting third party to destroy evidence of a crime.[13] Read as a whole, therefore, Third Circuit law provides no clear guidance on the question decided below.

Petitioner's claim (Pet. 18-19) that the decision below conflicts with *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992), and *United States* v. *Morrison*, 98 F.3d 619 (D.C. Cir. 1996), cert. denied,

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[12] Notwithstanding a claimed conflict with *Farrell*, this Court denied certiorari in *United States* v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998), cert. denied, 525 U.S. 1177 (1999) (No. 98-837), and *United States* v. *O'Kane*, 86 Fed. Appx. 447 (2d Cir.), cert. denied, 125 S. Ct. 38 (2004) (No. 03-10010), two cases factually more similar to *Farrell* than this one.

[13] Petitioner attempts to distinguish *Applewhaite* on the ground that the defendants there knew that a crime had been committed. Pet. 25. That fact is irrelevant. Section 1512(b)(2) is not limited to persons who act to destroy evidence of their own crimes. Moreover, as noted above, during the period when most of the documents were destroyed, petitioner knew that the SEC was investigating Enron, and its decision to destroy documents was thus itself a crime under 15 U.S.C. 1505.

520 U.S. 1131 (1997), is likewise incorrect. In *Poindexter*, the D.C. Circuit concluded that the phrase "corruptly influences" in Section 1505 was unconstitutionally vague as applied to the conduct of lying to Congress. The court also suggested that narrowing the term "corruptly" to mean influencing another person to violate his legal duty might eliminate that problem. 951 F.2d at 379. The statute at issue in *Poindexter* was Section 1505, and the decision expressly distinguished Section 1503, the statute on which Section 1512(b) was modeled, stating that "the language of § 1505 is materially different from that of § 1503." *Id.* at 385. Moreover, as noted above, petitioner has never suggested that Section 1512(b)(2)(A) and (B) is unconstitutionally vague, either on its face or as applied, and the *Poindexter* court's perceived need to interpret Section 1505 to avoid unconstitutional vagueness accordingly does not apply here. In any event, after *Poindexter*, Congress quickly rejected the D.C. Circuit's "nonsensical interpretation of section 1505," 142 Cong. Rec. S11,605, S11,608 (daily ed. Sept. 27, 1996) (statement of Sen. Nickles), by providing:

> As used in section 1505, the term "*corruptly*" *means acting with an improper purpose*, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

18 U.S.C. 1515(b) (emphasis added). Thus, to the extent it is relevant at all, *Poindexter* and the ensuing events provide further evidence of Congress's intent that, in the context of the obstruction of justice statutes, "corruptly" should mean acting with an improper purpose.

Morrison likewise does not conflict with the decision below. In *Morrison*, a defendant who exhorted a witness to testify falsely in his favor was convicted of corrupt persuasion under Section 1512(b). On appeal, Morrison argued that

his conduct was not "corrupt" under *Poindexter* because he did not use any improper means of persuasion. In affirming, the D.C. Circuit suggested in passing that *Poindexter*'s reasoning might also be applied to Section 1512, but the court did not decide that question because, even assuming that *Poindexter* did apply, Morrison had acted "corruptly" by attempting to convince a witness to "violate her legal duty to testify truthfully in court." 98 F.3d at 630. The holding of *Morrison*, *i.e.*, that the defendant's conduct was "corrupt," does not conflict with the decision below.

2. a. Petitioner contends (Pet. 26) that the "corruptly persuades" prong of Section 1512(b)(2) requires proof that the defendant knew his actions were wrongful. As the Fifth Circuit noted, Pet. App. 28a-29a, it is a "venerable principle that ignorance of the law generally is no defense to a criminal charge." *Ratzlaf* v. *United States*, 510 U.S. 135, 149 (1994). In *Pettibone* v. *United States*, 148 U.S. 197, 205 (1893), this Court applied that principle to a predecessor of 1503 that prohibited "corruptly * * * obstruct[ing] or impeded[ing], or endeavor[ing] to obstruct or impede, the due administration of justice [in a United States Court]." *Id.* at 197. Since that time, no court has interpreted the word "corruptly" in an obstruction of justice statute to require proof that the defendant knew his conduct was unlawful. See, *e.g.*, *United States* v. *Mullins*, 22 F.3d 1365, 1369 (6th Cir. 1994); *Poindexter*, 951 F.2d at 379.

b. Contrary to petitioner's claim (Pet. 27) the Fifth Circuit's application of that settled law does not conflict with *Ratzlaf*, *supra*, or *Bryan* v. *United States*, 524 U.S. 184 (1998). In *Ratzlaf*, this Court concluded that, as used in a provision that prohibited the structuring of cash transactions to evade reporting requirements, the term "willfully" required proof that the defendant knew his conduct was unlawful. 510 U.S. at 136-137. Unlike "corruptly," the term "willfully" has long been understood in certain contexts to

require proof of a knowing violation of a legal duty. See, *e.g.*, *Cheek* v. *United States*, 498 U.S. 192, 200-201 (1991). Moreover, the *Ratzlaf* Court adopted its interpretation to ensure that the statute's "willfulness" requirement would have a consistent meaning in several related provisions in the same subchapter. 510 U.S. at 142-143. Petitioner's interpretation, by contrast, would assign a different meaning to the term "corruptly" in Section 1512(b) than it carries in the related obstruction statues, an undesirable result at odds with the rationale of *Ratzlaf*.

Bryan, *supra*, which also interprets the statutory term "willfully," is likewise unhelpful to petitioner. In *Bryan*, the Court held that a conviction for willfully violating the statute prohibiting dealing in firearms without a license required proof only that a defendant knew that his conduct was unlawful and not that he was aware of the licensing requirement. 524 U.S. at 194-195. Nothing in *Bryan* undermines the consistent holding of the courts that there is no similar requirement in the obstruction statutes, nor does *Bryan* provide any support for imposing petitioner's proposed alternative requirement (Pet. 26) that the jury must find that a Section 1512 defendant had a "basic consciousness of wrongdoing."[14] In any event, the jury was required to find such a "basic consciousness of wrongdoing" in this case when it was instructed (Pet. App. 48a) that it had to find that the

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[14] Petitioner mischaracterizes *United States* v. *Aguilar*, 515 U.S. 593, 602 (1995), as holding that "an intent to obstruct justice is not in itself obviously wrongful" (Pet. 27). In *Aguilar*, where the Court merely stated that proof of an intent to obstruct justice, coupled with *any* act at all in furtherance of that intent, is not alone sufficient to impose criminal liability under 18 U.S.C. 1503. The court of appeals' decision in this case, by contrast, stands for the proposition that an intent to "subvert, undermine, or impede" a proceeding, coupled with the conduct of knowingly persuading someone to destroy a document so that it will be unavailable for use in that proceeding, violates Section 1512(b)(2).

defendant acted "corruptly," with an "improper purpose" to "subvert, undermine, or impede the fact-finding ability of an official proceeding." See *Thompson*, 76 F.3d at 451.[15]

c. Nor does the court of appeals' decision conflict with *United States* v. *Frankhauser*, 80 F.3d 641 (1st Cir. 1996). See Pet. 27. In *Frankhauser*, the First Circuit noted that, as a result of a prior conviction for obstructing justice, the defendant knew that his advice to destroy some papers was illegal, thereby "establishing that he acted with corrupt intent to violate the law." 80 F.3d at 652. The First Circuit did not hold, however, that such proof was a prerequisite for a Section 1512(b)(2) proceeding, cautioning that "[e]ach case must be evaluated on its own facts." *Ibid.* *Frankhauser* therefore stands only for the proposition that, where it exists, proof that the defendant knew his conduct was unlawful will suffice to show a corrupt intent.

3. Petitioner suggests that the jury should have been instructed that petitioner could not be found guilty unless it anticipated that an SEC proceeding was "likely" or "probable." Pet. 27-29. Petitioner did not request such an instruction in the district court (Pet. 29 n.28) and did not argue in the court of appeals that the failure to give it was plain error.[16] Accordingly, petitioner's claim is not properly pre-

[15] Petitioner's claim (Pet. 1, 4, 7, 12) that no one at Andersen believed that it was wrong to destroy Enron documents is inaccurate. Both Temple and Duncan were on notice that such conduct was improper. See note 2, *supra*. In addition, when Andersen auditors in Portland, Oregon, received the urgent message from Houston to "clean up the files," a senior supervisor declined for the Portland team. Tr. 5158-5168. As that supervisor later expressed: "[I]f you think there is going to be some requirement to produce these documents, then don't destroy anything. For God's sake, just don't do that." Tr. 5210.

[16] Petitioner's capable trial counsel doubtless never requested such an instruction because the evidence so clearly demonstrated petitioner's awareness that an official proceeding was likely (or indeed had already

sented here. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted) (noting that this Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below"); see *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

Petitioner contends (Pet. 28) that a "likely or probable" instruction was required by *United States* v. *Aguilar*, 515 U.S. 593 (1995). In *Aguilar*, this Court held that the defendant could not be convicted of an offense under Section 1503, which specifically requires proof of a "pending proceeding," absent proof that the "natural and probable" consequence of his action was to interfere with a grand jury proceeding. *Id.*

begun) when its employees were instructed to destroy Enron documents. See GX NT-1009 (Nancy Temple's Oct. 9 Notes describe an SEC investigation as "highly probable"); Tr. 1887-1894 (Duncan instructs petitioner's Enron engagement team to destroy all non-working paper Enron documents two business days after learning of the SEC's preliminary investigation).

The record also belies petitioner's related claim (Pet. 7-9) that it did not view an SEC request for its own documents as "likely" until it definitely concluded that Enron would have to restate its earnings. In fact, Nancy Temple knew from studying the Waste Management and Sunbeam matters that the SEC might request documents from petitioner before a restatement was even filed. See GX NT Undated, at A-004609 (Temple's notes on Waste Management state "No restate until Feb. SEC all over us in Jan."), Tr. 6093-6096; Tr. 448-459 (SEC requests petitioner's Sunbeam documents months before a restatement is filed). Moreover, Duncan knew by October 23, 2002, that Enron's balance sheet would have to be restated and expected the SEC to investigate any restatements. Tr. 1849-1850, 1904-1905. And while Andersen partner John Riley claimed to have believed that the SEC would subpoena petitioner's records only if Enron restated its *income*, Tr. 6198, there is no evidence that Temple, Duncan, or the SEC shared this view. Riley's claim was also substantially impeached by his testimony during the Sunbeam matter, where he acknowledged knowing from the first sign of adverse publicity that petitioner was going to have a problem with an SEC investigation. Tr. 6120.

at 599. Although the petition for certiorari relies extensively on *Aguilar* (Pet. 12, 14-15, 22, 25, 26, 27, 28), petitioner never claimed in the district court that *Aguilar* applied to this prosecution, barely mentioned the case in its pre-trial motions, and then failed to cite it once in its opening appellate brief. Petitioner has therefore waived any claim that *Aguilar* applies to prosecutions under Section 1512.

4. Petitioner did request an instruction requiring the jury to find that it intended to obstruct a "particular" official proceeding that was "ongoing or scheduled to be commenced in the future." But the district court's decision not to give such an instruction does not warrant further review. As the Fifth Circuit observed, petitioner's claim that the proceeding must be "ongoing or scheduled" "defie[d] the statutory provision [18 U.S.C. 1512(e)(1)(2000)] that an official proceeding 'need not be pending or about to be instituted at the time of the offense.'" Pet. App. 26a. Lower courts accordingly have uniformly declined to impose such a requirement under Section 1512(b)(2). See *Frankhauser*, 80 F.3d at 652 ("an official proceeding need not be pending or about to be instituted at the time of the corrupt persuasion"); *United States* v. *Kelley*, 36 F.3d 1118, 1128 (D.C. Cir. 1994); *United States* v. *Conneaut Indus., Inc.*, 852 F. Supp. 116, 125 (D.R.I. 1994).

Nor does Section 1512(b)(2) require proof that petitioner anticipated a "particular" federal proceeding. The statute's language requires only that the defendant have acted with intent to obstruct "an official proceeding." See 18 U.S.C. 1512(b)(2)(A) and (B). Indeed, by specifying that an official proceeding need not be pending, see 18 U.S.C. 1512(e)(1) (2000), and that defendant need not know that the official proceeding is a federal one, see 18 U.S.C. 1512(f) (2000), Congress signaled that the defendant's knowledge about the proceeding need only be general, not particular. Furthermore, adoption of a "particular proceeding" limitation would create an absurd loophole, permitting a company that destroyed crucial documents after learning of an imminent federal investigation to escape conviction by claiming that it did not know the "particulars" of that investigation. Congress did not intend such a result.[17]

Even if a "particular proceeding" requirement were imported into Section 1512(b)(2)(A) and (B), petitioner's requested instruction would have been unnecessary because, as the Fifth Circuit found, "[t]his case was tried on the theory that petitioner intended to undermine, subvert, or impede a proceeding of the SEC," Pet. App. 27a, and it was "clear at every step" "[t]hat the SEC was the feared opponent and initiator of a proceeding and not some other shadowy opponent," *id.* at 28a. Because there was only one proceeding that the jury could have found petitioner intended to obstruct, any instructional error in this regard was harmless. *Ibid.*; see *Neder* v. *United States*, 527 U.S. 1, 7-15 (1999).[18]

Although petitioner suggests (Pet. 28-29) that the jury may have convicted it based solely on the adoption of a document retention policy, the record belies that claim. The indictment charged petitioner with a scheme to destroy Enron-related documents, and specified that the offense oc-

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[17] In *Frankhauser*, the First Circuit suggested that "the defendant must act knowingly and with the intent to impair an object's availability for use in a particular official proceeding." 80 F.3d at 651. At the same time, the court seemed to conclude that such proof was *not* required, affirming a conviction even though it was unclear which of two potential proceedings the defendant anticipated. See *id.* at 652 (finding the defendant "expected a grand jury investigation and/or a trial in the foreseeable future.").

[18] Petitioner itself contended below that "the evidence in the case suggests that the only proceeding that could have been affected is one involving the SEC." Tr. 6295; see R. 1125 (argument by petitioner that "the government's case against [petitioner] rests entirely on the theory that Andersen partners persuaded others to destroy documents with the intention of making them unavailable for use in an incipient SEC proceeding").

curred at a time long after petitioner's document retention policy was adopted. The government's trial evidence proved the same scheme to destroy Enron-related documents that was alleged in the indictment. And the government specifically informed the jury in closing argument that "there's nothing criminal about having a document policy. What is a crime is to take it out, blow it off, and implement it in the middle of an SEC investigation because you want to be able to control what documents the Government gets to see and what documents it doesn't." Tr. 6419. Thus, as the court of appeals concluded, "[t]here was no risk of conviction for innocent maintenance of a records program." Pet. App. 28a.[19]

5. Finally, petitioner contends that this Court should grant certiorari to determine whether an informal SEC investigation constitutes an "official proceeding" as defined under 18 U.S.C. 1515(a)(1)(C). Although petitioner raised that issue in the district court, it was mentioned only in a footnote to petitioner's lengthy opening appellate brief. Pet. C.A. Br. 70 n.24. The government therefore contended that the claim had been waived. Gov't C.A. Br. 92 n.34. The Fifth Circuit apparently agreed with the government, declining to address the issue in its opinion. Pet. App. 2a. Because this issue was not "pressed or passed upon below," *Williams*, 504 U.S. at 41, certiorari review is not available.

[19] Without citing any authority, petitioner asserts (Pet. 17) that "virtually all companies of any size [have] adopted document retention policies that permit or require the destruction of potentially harmful materials prior to the initiation of actual proceedings or the receipt of a subpoena." See Pet. 12. In fact, document policies generally protect relevant materials from destruction whenever litigation or government investigations are anticipated. See, *e.g.*, Christopher V. Cotton, *Document Retention Programs for Electronic Records: Applying a Reasonableness Standard to the Electronic Era*, 24 J. Corp. L. 417, 422 (1999) ("In general, records retention programs should * * * provide for the suspension of document destruction when litigation is imminent."); *Lewy* v. *Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (corporation cannot destroy documents pursuant to policy if it "knew or should have know that [they] would become material at some point in the future").

In any event, petitioner's claim that a preliminary SEC investigation is not an official proceeding is without merit. Petitioner merely cites (Pet. 30 n.30) two cases in which the courts held that agency investigations with certain characteristics qualified as proceedings under the obstruction statutes; petitioner cites no case, and we are aware of none, holding that a preliminary SEC investigation is not an official proceeding. Courts have long considered agency investigations, even preliminary ones, to be proceedings under the obstruction statutes. See *United States* v. *Browning, Inc.*, 572 F.2d 720, 724 (10th Cir.), cert. denied, 439 U.S. 822 (1978); *United States* v. *Leo*, 941 F.2d 181, 199 (3d Cir. 1991); *United States* v. *Fruchtman*, 421 F.2d 1019, 1021 (6th Cir.), cert. denied, 400 U.S. 849 (1970); *Rice* v. *United States*, 356 F.2d 709, 713 (8th Cir. 1966). Furthermore, contrary to petitioner's argument, the courts have also reasoned that the term "proceeding" is not limited to those aspects of an agency's investigation that are conducted under the authority to issue subpoenas and administer oaths. See *Browning, Inc.*, 572 F.2d at 724 ("We do not see that the use of this machinery [*i.e.*, the regulatory authority to administer oaths] would have made the proceeding more like a 'proceeding' [under Section 1505] simply by virtue of the issuing of a subpoena formally or the giving notice of a preliminary investigation."); see also, *e.g.*, *Leo*, 941 F.2d at 187, 199 (standard post-award audit of defense contractor by Defense Contract Audit Agency was a Section 1505 "proceeding"); *Fruchtman*, 421 F.2d at 1021 (investigation conducted by single FTC attorney who made request to see defendant's invoices was a Section 1505 "proceeding").[20]

[20] Contrary to petitioner's argument (Pet. 3 & n.4), it is irrelevant that the SEC defines a "proceeding" as an agency process initiated by an order

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of the Commission, see 17 C.F.R. 201.202(a)(7) and (9). Congress nowhere incorporated the SEC's definition of "proceeding" into Section 1512. Rather, Congress defined "official proceeding" for purposes of Section 1512 as "a proceeding before a Federal Government agency which is authorized by law." 18 U.S.C. 1515(a)(1)(C). A preliminary investigation by the SEC is "authorized by law," see 17 C.F.R. 202.5(a), and, as noted in the text, the courts have found preliminary investigations to be proceedings.